84-226 (2)

No. 84-

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,

IN THE

Supreme Court of the United States

October Term, 1984

ABRAHAM LEVINE, as Administrator of the estate of FANNIE LEVINE, deceased, for a judgment pursuant to Article 78 of the C.P.L.R.,

Petitioner,

against

BARBARA BLUM, as Commissioner of the New York State Department of Social Service, DAVID AXELROD, as Commissioner of the New York State Department of Health, Office of Health Systems Management (hereafter called Agency),

Respondents.

On Writ of Certiorari to the New York Court of Appeals

BRIEF FOR RESPONDENTS IN OPPOSITION

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BEST AVAILABLE COPY

Questions Presented

1. Is petitioner entitled to an award of attorney's fees pursuant to 42 U.S.C. § 1988 notwithstanding his failure to present a claim under 42 U.S.C. § 1983?

2. Is a *pro se* petitioner entitled to an award of attorney's fees under 42 U.S.C. § 1988?

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No. 84-

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October Term, 1984

ABRAHAM LEVINE, as Administrator of the estate of FANNIE LEVINE, deceased, for a judgment pursuant to Article 78 of the C.P.L.R.,

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BARBARA BLUM, as Commissioner of the New York State Department of Social Service, DAVID AXELROD, as Commissioner of the New York State Department of Health, Office of Health Systems Management (hereafter called Agency),

Respondents.

On Writ of Certiorari to the New York Court of Appeals

BRIEF FOR RESPONDENTS IN OPPOSITION

Decisions Below

By order dated October 12, 1982, the New York State Supreme Court, Kings County, denied petitioner's application for attorney's fees (*Feldman*, J.). No opinion was rendered. The order is reproduced in the Appendix to this brief at p. 1a.*

* Numbers followed by the letter "a" refer to pages in the Appendix to this brief.

On January 9, 1984, the Appellate Division, Second Department unanimously affirmed the lower court's order, with costs and without an opinion. This order is reproduced herein at pp. 2a-3a.

On April 3, 1984, the New York State Court of Appeals denied petitioner's motion for leave to appeal to that Court. This order is reproduced in the Appendix herein at p. 4a.

Jurisdiction

Jurisdiction to review the order in question is asserted by petitioner under 28 U.S.C. § 1257(3).

Statute Involved

The Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. 94-559 (Oct. 19, 1976), 90 Stat. 2641, amending 42 U.S.C. § 1988, states in relevant part:

> "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Statement of the Case

A. Background

1. The First State Court Proceeding

On December 14, 1979, an administrative hearing pursuant to Section 22 of the New York Social Services Law was held to review the Department of Health's denial of Medicaid to petitioner's deceased mother for services rendered from July 6 to July 29, 1979.*

Commissioner Blum rendered a Decision After Hearing dated February 5, 1980, affirming the Health Department's determination to deny reimbursement for private nursing services rendered during this period on the ground that reimbursement for these services was not authorized by Departmental regulations for services rendered prior to October 9, 1979.** The Commissioner also directed the De-

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* Fannie Levine, petitioner's mother, was a hospital in-patient in Kings Highway Hospital, Brooklyn, New York, from July 6, 1979, to July 29, 1979. During that period she received private duty nursing care services. Petitioner's mother was hospitalized again, in the same hospital, on September 29, 1979, where she remained until her death on November 9, 1979. Petitioner's mother also had private nurses on a twenty-four hour basis, seven days a week, during the second period of hospitalization. In September and again in October 1979, two separate applications were made for medical assistance reimbursement for the private duty nursing care rendered to Fannie Levine.

** The Commissioner found that although Ch. 444 of the Laws of 1979 of the State of New York, effective April 1, 1979, authorized reimbursement under the medical assistance program for private duty nursing care for hospital in-patients, such reimbursement could only be provided in accordance with the implementing Regulations of the Department of Health, which did not take effect until October 9, 1979. Therefore, the Commissioner held that payment for such services provided prior to October 9, 1979, was precluded.

partment of Health to re-evaluate the request for payment for the period of hospitalization after October 9, 1979, to determine whether that request met the programmatic requirements for payment.

On May 20, 1980, petitioner, a lawyer appearing *pro se*, commenced a proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules ("CPLR") seeking only a judgment reversing and annulling the administrative determinations made by respondents Blum and Axelrod, dated February 5, 1980, and October 3, 1979, respectively, and directing reimbursement by the State Department of Social Services in the sum of $3,668.00, the amount expended by Mr. Levine for his mother's private nurses during the first hospitalization. No constitutional or statutory violations which could conceivably give rise to a civil rights claim under 42 U.S.C. § 1983 were pleaded in the petition.

In a written decision dated October 21, 1980, the New York State Supreme Court, Kings County, remanded the matter to respondent Blum for further proceedings not inconsistent with the decision.* A judgment was entered on December 8, 1980, and provided that the petition was granted only "to the extent that the matter is remanded to the respondent for further proceedings not inconsistent with the court's decision." In accordance with the terms of the judgment, no costs, fees or disbursements were awarded petitioner. This judgment was not appealed.

* Judge Bernstein held only that the respondent's Decision After Hearing was arbitrary and capricious in light of the court's finding that the effective date of the state statute involved was April 1, 1979, rather than October 9, 1979.

Commissioner Blum then remanded the matter to the Health Department for a new determination. On May 7, 1981, the agency denied the application for medical assistance reimbursement for private duty nursing care rendered between July 6 and July 19, 1979, on the ground that there was no documentation indicating that the patient was in need of individual and continuous care beyond that available by the staff of Kings Highway Hospital, including that which is available in a critical care area.

On June 30, July 1 and July 2, 1981, a further hearing was held by the Department of Social Services to review the denial relating to the period of hospitalization from July 6 to July 29, 1979. Commissioner Blum then rendered a Decision After Hearing dated January 6, 1982, reversing the agency's determination, and directing payment to petitioner for $3,668.00. On March 22, 1982, as a result of the favorable decision, petitioner received a check for the above amount, representing satisfaction of petitioner's claim against respondents for private duty nursing care rendered in July, 1979.

2. The Second State Court Proceeding

As a result of the Department's denial of petitioner's second request for medical assistance, petitioner requested another administrative hearing.* After the hearing held May 27, 1980, the then State Commissioner Blum found in a Decision After Hearing dated July 11, 1980, that the

* The Department denied this request on the grounds that the patient's physician failed to demonstrate that the level of nursing care required by Fannie Levine could not have been met by the regular floor nurses, or by the hospital's intensive care, a showing required by the relevant departmental regulation, 10 NYCRR § 85.33(c).

agency had properly denied Medicaid since the level of medical care required by Fannie Levine could have been provided by the hospital's intensive care unit as well as by private duty nurses.

Petitioner then commenced a second Article 78 proceeding against respondents here, by Notice of Petition and Verified Petition, dated October 8, 1980. This proceeding sought review of Commissioner Blum's Decision After Hearing dated July 11, 1980, and thus related only to the second period of hospitalization. The sole relief requested there was that a judgment be granted pursuant to Article 78 of the CPLR reversing and annulling the adverse administrative determinations and that *pro se* petitioner be awarded $6,718.00 as reimbursement for the monies expended on his mother's nursing care.*

In an oral decision issued from the bench, the New York County Supreme Court, Kings County, granted the petition (*Shaw*, J.) The judgment, entered on February 6, 1981, provided only that the "petition is granted", that respondent Blum's determination is nullified, and that respondents were to pay petitioner, individually, the sum of $6,716.00. Neither costs nor fees were awarded. In July 1981 petitioner was paid pursuant to the February 1981 order, in full satisfaction thereof.

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* Both the Notice of Petition and Verified Petition of October 1980 were devoid of any claim that petitioner's rights had been violated under Section 1983 of Title 42 of the United States Code. Similarly, no request for attorney's fees, costs or reimbursement was made therein. Petitioner also filed a supplemental petition, verified on December 5, 1980. Again, notwithstanding an additional opportunity to do so, he made no claim for relief pursuant to 42 U.S.C. § 1983.

B. The Third State Court Proceeding for Attorney's Fees

On April 23, 1982, *pro se* petitioner Abraham Levine served upon the state respondents an application denominated as "Notice of Petition" and "Petition," returnable in the New York State Supreme Court, Kings County. This application, bearing the same index number as petitioner's second proceeding, was actually no more than a belated attempt to obtain an award of attorney's fees pursuant to 42 U.S.C. § 1988 despite petitioner's failure to plead a cause of action under 42 U.S.C. § 1983 in two prior Article 78 proceedings, which merely sought Medicaid reimbursement.*

The Reasons for Denying the Writ

A. Petitioner Was Not a Prevailing Party Under § 1983.

The instant application for a writ of certiorari to review the New York State court decision should be denied because

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* Attempting to bring his case within the ambit of § 1983, petitioner sought a declaration that, *inter alia:*

(a) ". . . the claimant herein was deprived under color of State Law of a right secured by the Constitution and Laws of the U.S." (Petition, ¶ 2),

(b) ". . . the claimant herein was entitled to medical assistance, with 'reasonable promptness' " . . . (Petition, ¶ 3),

(c) ". . . that the Administrative decisions were so lacking in reasonable justification as to constitute a due process violation in themselves—quite aside from resulting delay in granting the benefit requested that they were arbitrary and capricious . . ." (Petition, ¶ 9),

(d) ". . . Declaring that the denials issued by the Agency and the affirmations issued by respondent Blum were so unreasonable as to be arbitrary and capricious and erroneous as a matter of law." (Petition, ¶ 15).

Petitioner also claimed in paragraph 45 thereof, that "No prior application other than as set forth herein has been made for the relief requested."

there are no special and important reasons warranting such review here. See U.S. Sup. Ct. Rule 17, 28 U.S.C.A.

Petitioner, an attorney appearing *pro se* as an administrator of his mother's estate, brought two proceedings pursuant to the New York Civil Practice Law and Rules, Article 78, to reverse and annul two determinations of the State Commissioner of the Department of Social Services, which affirmed the decision of the State Department of Health to deny Medicaid reimbursement for private duty nursing services rendered to petitioner's mother. In these proceedings, petitioner did not claim that the denial of Medicaid reimbursement deprived him of rights secured by the U.S. Constitution, federal statute or under 42 U.S.C. § 1983. No violations of constitutional dimension or of 42 U.S.C. § 1983 were claimed in the prior proceedings. Petitioner simply failed, at any time, to plead a cause of action under § 1983.

Notwithstanding the fact that petitioner ultimately obtained the relief sought in his Article 78 proceeding, reimbursement from Medicaid, petitioner was not a prevailing party in a proceeding embraced within 42 U.S.C. § 1983. Although § 1983 encompasses claims based solely on a violation by the State of a right created by Federal Statute, and is not limited to a Federal constitutional violation or a violation of a Federal statute providing for the protection of civil or equal rights, *Maine* v. *Thiboutot*, 448 U.S. 1 (1980); *Matter of Rahmey* v. *Blum*, 95 A.D.2d 294, 466 N.Y.S.2d 350 (2d Dep't 1983), any award of attorney's fees is inappropriate and will not be granted where relief

is sought solely on state grounds, rather than pendent to a federal or constitutional claim. *Cf. Matter of Johnson* v. *Blum*, 58 N.Y.2d 454, 458 n. 2, 461 N.Y.S.2d 782, 783, 448 N.E.2d 449, 450 (1983); *Gagne* v. *Maher*, 549 F.2d 336, *aff'd*, 448 U.S. 122 (1980). Here petitioner neither presented nor prevailed on a claim embraced within § 1983, and accordingly, fees were properly denied by the state courts.

Moreover, the underlying basis for petitioner's subsequent fee application was the two Article 78 proceedings seeking review of respondent Blum's Medicaid decisions. The lower courts had before them merely two successive ordinary petitions for reversal of administrative determinations. Denial of a fee award in such cases does not undermine the purpose of Section 1988, nor will it have any effect of national significance. The decisions by the lower court were made pursuant to state law, and no violations of constitutional dimension or of a federal statute were found or could have been found since none were presented.

Further, petitioner's application for attorney's fees was untimely and unfairly prejudiced and surprised respondents. In *White* v. *New Hampshire*, 679 F.2d 283 (1st Cir.), *rev'd and remanded*, 455 U.S. 445 (1982), this Court reiterated the fact that an award of fees under Section 1988 is discretionary with the court, and expressly noted that one way a court can deal with an untimely fee application is to deny it. "We believe that this discretion will support a denial of fees in cases in which a post-judgment motion unfairly surprises or prejudices the affected party." *White*, 455 U.S. at 454. The attorney's fee application in the case at bar was made more than one year after entry of the second judgment in the second state court proceeding. Not only were attorney's fees not specifically requested, but no cause

of action under § 1983 was pleaded in either of the two original petitions, or the amended petition. Thus, the state courts properly exercised their discretion to deny fees.

Similarly, any attempt to relitigate, in the subsequent fee application pursuant to § 1983, constitutional issues which petitioner had the opportunity to present in the first two state court proceedings, is barred by *res judicata*. See *Southern Jam, Inc.* v. *Robinson*, 675 F.2d 94 (5th Cir. 1982).

B. *Pro Se* Petitioner Is Not Entitled to an Award of Attorney's Fees.

Even if petitioner had been a prevailing party under § 1983, in no event would he be entitled to an award of attorney's fees under § 1988 because has has proceeded *pro se*. In *Coffield* v. *City of Atlanta*, 648 F.2d 986 (5th Cir. 1981), the court held that notwithstanding the fact that plaintiff prevailed in an employment discrimination case, he was not entitled to recover an award of attorney's fees under § 1988. The court noted that acts allowing attorney's fees are "not passed for the benefit of attorneys but to enable litigants to obtain competent counsel" (citations omitted). *Id.* at 987. The court also noted that awards of fees are not intended to produce windfalls.

In *Pitts* v. *Vaughn*, 679 F.2d 311, 313 (3d Cir. 1982), the court denied an award of fees under § 1988 to a successful *pro se* civil rights litigant for two reasons. First, proceeding *pro se* may not involve the same financial burdens inherent in retaining a lawyer. Second, self-representation does not supply the same detachment and objectivity that an

outside attorney can provide as a check against groundless or unnecessary litigation.

While the *pro se* plaintiffs in *Coffield* and *Pitts* were not attorneys, and petitioner is, this makes no difference in applying Section 1988. Petitioner here was reimbursed individually for all the money he spent personally for his mother's nursing care. To award him a fee for services rendered to himself would frustrate the intent of Congress in enacting Section 1988, which was to assure civil rights claimants access to attorneys. Petitioner, having chosen to represent himself, cannot now seek the benefit of Section 1988.

Moreover, a lawyer representing himself is held to a more stringent standard in litigating claims, and should not be awarded fees under § 1988 where he litigates a claim which is groundless. *Harbulak* v. *County of Suffolk*, 654 F. 2d 194 (2d Cir. 1981) (defendants awarded fees under § 1988). Petitioner's application for fees was no more than an afterthought and an attempt to relitigate the same issues presented in the two prior proceedings which were decided favorably to him. Unnecessary and duplicative litigation militate against an award of fees. See *Matter of Ellis* v. *Blum*, 82 A.D.2d 761, 440 N.Y.S.2d 208 (1st Dep't 1981).

Conclusion

The Petition for a Writ of Certiorari Should Be Denied.

Dated: New York, New York
July 26, 1984

Respectfully submitted,

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Attorney General of the
State of New York
Attorney for Respondents

PETER H. SCHIFF
Acting Attorney-in-Chief
Appeals and Opinions

FREDERICK MEHLMAN
Acting Chief, Litigation Bureau

MARYELLEN WEINBERG
DONNA N. MILLER
Assistant Attorneys General
Of Counsel

APPENDIX

Memorandum Order

SUPREME COURT : KINGS COUNTY

(SPECIAL TERM, PART I)

By FELDMAN, J.

Dated October 12, 1982

Index No. 10251/80

ABRAHAM LEVINE, as Administrator of the Estate of FANNIE LEVINE, dec., for a judgment pursuant to Art. 78, CPLR,

Petitioner,

vs.

BARBARA BLUM, as Commissioner of the N.Y. State Dept. of Social Services, and DAVID AXELROD, as Commissioner of the N.Y. State Dept. of Health, Office of Health Systems Management,

Respondents.

Upon papers and oral argument, petitioner's application for attorney's fees is denied.

This decision shall constitute the order of the court.

ENTER

/s/ AGS
J. S. C.
Hon. Anne G. Feldman

FILED
Oct 18, 1982
County Clerk
Kings County

Order of the Supreme Court of the State of New York, Appellate Division, Second Department

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on January 9, 1984

HON. MILTON MOLLEN, Presiding Justice,
HON. LEON D. LAZER,)
HON. WILLIAM C. THOMPSON,) Associate Justices
HON. SEYMOUR BOYERS.)

ABRAHAM LEVINE, as Administrator, etc.,
Appellant,

v.

BARBARA BLUM, as Commissioner of the New York State Department of Social Services, et al.,
Respondents.

In the above entitled cause, the above named Abraham Levine, as Administrator, etc., petitioner, having appealed to this court from an order of the Supreme Court, Kings County, dated October 12, 1982; and the said appeal having been argued by Abraham Levine, Esq., appellant *pro se*, and argued by Donna N. Miller, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the order appealed from is hereby unanimously affirmed, with costs.

Enter:

Clerk of the Appellate Division

Order of the Supreme Court of the State of New York, Appellate Division, Second Department

E/bh
MILTON MOLLEN, P.J.
LEON D. LAZER
WILLIAM C. THOMPSON
SEYMOUR BOYERS, JJ.

—— AD2d——

277 NE

A—December 20, 1983

ABRAHAM LEVINE, as Administrator, etc.,
Appellant,

v.

BARBARA BLUM, as Commissioner of the New York State Department of Social Services, et al.,
Respondents.

Abraham Levine, Brooklyn, N.Y., appellant *pro se.*

Robert Abrams, Attorney-General, New York, N.Y. (Melvyn R. Leventhal, Maryellen Weinberg and Donna N. Miller of counsel), for respondents.

Order of the Supreme Court, Kings County (FELDMAN, J.), dated October 12, 1982, affirmed, with costs. No opinion.

MOLLEN, P.J., LAZER, THOMPSON and BOYERS, JJ., concur.

Order of the Court of Appeals of the State of New York

STATE OF NEW YORK

COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the third day of April A. D. 1984

Present,

HON. LAWRENCE H. COOKE, *Chief Judge, presiding.*

2 Mo. No. 211

In the Matter of ABRAHAM LEVINE, as Administrator &c.,

Appellant,

For a Judgment &c.

vs.

BARBARA BLUM, as Commissioner of the New York State Department of Social Services, et al.,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

/s/ KATHRYN C. BROWN

KATHRYN C. BROWN
Deputy Clerk of the Court